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January 16, 2004

By Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

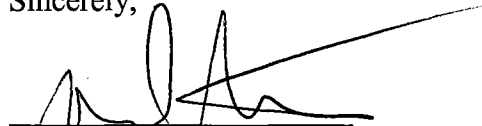
Re: *Ex Parte Presentation*
Review of Regulatory Requirements for Incumbent LEC Broadband
Telecommunications Services – CC Docket No. 01-337;
Section 272(f)(1) Sunset of the BOC Separate Affiliate and
Related Requirements – WC Docket No. 02-112; and
Performance Measurements and Standards for Interstate
Special Access Services – CC Docket No. 01-321

Dear Ms. Dortch:

On January 16, 2004, the attached letter was sent to Michelle Carey, Chief,
Competition Policy Division, Wireline Competition Bureau, on behalf of MCI.

Pursuant to the Commission's rules, this letter is being provided to you for
inclusion in the public record of the above-referenced proceedings.

Sincerely,


Gil M. Strobel

Attachment

cc: Michael Carowitz
William Dever
Jon Minkoff
Henry Thaggert

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January 16, 2004

By Electronic Delivery

Michelle Carey
Chief, Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Written Ex Parte*
Safeguards for Incumbent LECs' Provision of Frame Relay, ATM
and DSL Services in the Absence of Dominant Carrier Regulation

Dear Ms. Carey:

In the pending *Broadband Dominance/Non-Dominance* and *Section 272 Safeguards* proceedings, the Federal Communications Commission (FCC or Commission) is considering, *inter alia*, the appropriate regulatory treatment of interLATA and intraLATA Frame Relay and Asynchronous Transfer Mode (ATM) services offered on a retail basis by incumbent local exchange carriers (LECs) to enterprise customers.¹ Specifically, the Commission is examining whether and under what circumstances incumbents should be treated as non-dominant for the provision of those services.² The Commission is also considering in these proceedings whether

¹ See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Broadband Dominance/Non-Dominance NPRM*); *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd 9916 (2002) (*Section 272 Safeguards NPRM*).

² See *Broadband Dominance/Non-Dominance NPRM* ¶¶ 1, 22, 38-48; *Section 272 Safeguards NPRM* ¶¶ 3, 17.

and under what circumstances incumbent LECs should be treated as non-dominant in the provision of Digital Subscriber Line (DSL) service.³

As explained below, because incumbent LECs continue to exercise market power in local telecommunications markets, the FCC must not relax regulation of their retail Frame Relay, ATM and DSL offerings without first putting in place the safeguards necessary to prevent the incumbent LECs from exploiting their market power to achieve an anti-competitive advantage with respect to both interLATA and intraLATA services.⁴ The proposed safeguards are designed to limit the incumbent LECs' ability to raise their rivals' costs. To the extent the safeguards succeed in fostering competition, they also will effectively limit the incumbent LECs' ability to restrict output unilaterally.⁵ The fact that the Bell Operating Companies (BOCs) now have received authority to offer in-region interLATA services in all the states in which they operate underscores the need for prompt implementation of the proposed safeguards.

Incumbent LEC Market Power in Local Telecommunications Markets

Incumbent LECs continue to exercise market power in local telecommunications markets by virtue of their control over bottleneck "last mile" facilities. In the case of Frame Relay, ATM and DSL services, incumbents can use this dominance in the provision of last mile connections to gain an anticompetitive advantage over rival providers of those services.

Although MCI and other competitive carriers today are able to compete directly with incumbent LECs in offering retail ATM and Frame Relay services to enterprise customers, competitive carriers still depend on the incumbents to provide the building-block communications links (*i.e.*, special access service) that competitors need to offer their Frame

³ See *Broadband Dominance/Non-Dominance NPRM* ¶¶ 1, 5-6, 38-48; *Section 272 Safeguards NPRM* ¶ 3.

⁴ The Commission has previously determined that it is necessary to have adequate safeguards in place before classifying a carrier as non-dominant in the provision of a particular service. In the *LEC Classification Order*, for instance, the Commission classified the Bell Operating Companies' (BOCs') interLATA affiliates as nondominant in the provision of in-region, interstate, domestic, interLATA services, but explicitly recognized that safeguards were necessary to prevent the BOCs from using their market power in the upstream local exchange and exchange access business to act anticompetitively in the downstream long distance business. *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, ¶¶ 6, 91 (1997) (*LEC Classification Order*). The Commission concluded that the least burdensome way to address this potential for anti-competitive behavior was to rely on regulatory safeguards other than dominant carrier regulation. *Id.* ¶ 91.

⁵ See, e.g., *LEC Classification Order* ¶ 97 (concluding that demand substitutability would prevent BOC interLATA affiliates from raising prices by restricting output as customers would be willing to shift their traffic to rival carriers in response to an attempted price increase).

Relay and ATM services. The incumbents' control over these essential inputs gives them the incentive and ability to hamper and even frustrate competitive entry by raising the cost of providing the retail products offered by rival firms. The incumbent LECs' poor and irregular provisioning of special access, for example, is one way of raising the costs of competing providers.⁶ Another way of raising rivals' costs is by hampering the ability of competitors to migrate circuits from incumbent LEC networks to competing networks in a timely and efficient manner. To prevent such abuses of market power, it is essential that the FCC ensure that competing Frame Relay and ATM providers have timely and efficient access to special access links and are able to migrate circuits efficiently, before the Commission considers relaxing the current dominant carrier regulation of the incumbent LECs' provision of Frame Relay and ATM services.⁷

For the same reasons, the FCC must take steps to prevent incumbent LECs from using their control over last mile loop facilities to limit rival carriers' ability to compete effectively in the provision of DSL. Competitive carriers need access to incumbent-LEC controlled loops in order to offer DSL service. Otherwise, there is a risk that the incumbent LECs will use their power over these essential inputs to raise their rivals' costs, thereby limiting competition for DSL services. The Commission should address this risk by adopting safeguards designed to ensure that competing providers of DSL service have access to the wholesale loop transmission services that they require to offer products that compete with the incumbent LECs' DSL service.

In sum, the Commission must adopt and implement safeguards that will prevent incumbent LECs from using their market power over local "last mile" facilities to limit and potentially to foreclose competition in the provision of retail Frame Relay, ATM and DSL services. Implementation of adequate safeguards is a necessary prerequisite to the FCC's consideration of non-dominant regulation of the incumbent LECs' provision of interLATA and intraLATA Frame Relay and ATM services to enterprise customers and DSL service to mass market customers.

Safeguards for Frame Relay and ATM Services

The FCC should adopt three safeguards as a precondition to considering relaxing regulation of the incumbent LECs' provision of intraLATA Frame Relay and ATM services: special access metrics, grooming requirements, and separate affiliate requirements.

⁶ See, e.g., *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking ¶ 139, 11 FCC Rcd 18877 (1996) (explaining that one way in which a BOC can use its market power in the provision of local exchange and exchange access services is by providing rival carriers poorer quality service than the BOC offers its own affiliate).

⁷ The relaxed regulations would include relief from rate regulation, tariffing requirements, tariff support and pricing regulations; lightening of Section 214 obligations; and relief from certain accounting requirements. See *Broadband Dominance/Non-Dominance NPRM* ¶¶ 5, 9.

1) Special Access Metrics. The FCC should adopt the special access performance metrics, standards and enforcement plan proposed by the Joint Competitive Industry Group (JCIG).⁸ As the record in the special access provisioning proceeding⁹ clearly shows, adoption of the JCIG proposal is necessary to ensure that BOC competitors have timely, efficient, and non-discriminatory access to transmission services that are essential to serve the telecommunications needs – especially data needs – of enterprise customers. Incumbent LECs, of course, must continue providing special access services as tariffed exchange access offerings.

2) Grooming. The FCC should adopt minimum “grooming” requirements to ensure that competitive carriers can migrate special access circuits quickly and efficiently from the incumbent LECs’ networks to their own networks or to those maintained by other competitors. Competitors build their local transport networks by gradually replacing incumbent LEC-provided interoffice special access links with their own fiber-optic facilities. In most cases, however, the competitive carrier must continue to rely on incumbent LEC facilities for the last-mile connection between the competitor’s network and the end-user customer. The deployment of additional transport facilities essentially allows the end user’s traffic to be routed over competitive facilities at a point closer to the end user’s premises. “Grooming” is the industry term that refers to the process by which an incumbent LEC’s special access circuit is migrated to a competing carrier’s local transport network.

Grooming requires coordination between the incumbent LEC and the competitive LEC to prepare and implement the groom and deactivate the original path after the cutover has been completed. When an incumbent LEC unreasonably limits the ability of a competitive LEC to migrate circuits to its network, the incumbent gains an unfair and unwarranted competitive advantage. In particular, an incumbent LEC’s failure to migrate circuits in the volumes requested by competitive LECs perpetuates competitors’ dependence on incumbent LEC facilities, and prevents competitive carriers from realizing the full economic benefit of their investment in alternative transport facilities.

Moreover, without timely action on grooming orders, backlogs of unfilled migration orders will accumulate, forcing competitors to pay twice for transport: once for the fiber they have deployed, and once for the incumbent LEC transport circuits they must continue to lease until the circuits have been migrated to the competitive network. This failure to migrate circuits

⁸ See *ex parte* letter from A. Richard Metzger, Jr. to Magalie Salas, CC Docket No. 01-321 (Jan. 22, 2002) (attaching JCIG Proposal, “ILEC Performance Measurements & Standards in the Ordering, Provisioning, and Maintenance & Repair of Special Access Service”); *ex parte* letter from A. Richard Metzger, Jr. to William Caton, CC Docket No. 01-321 (Feb. 12, 2002) (attaching JCIG Proposal Regarding Essential Elements of a Special Access Provisioning Enforcement Plan); *ex parte* letter from Ruth Milkman to Marlene Dortch, CC Docket No. 01-321 (June 18, 2002) (attaching JCIG Proposal Regarding Special Access Provisioning Remedies).

⁹ *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001).

in a timely manner will not only needlessly inflate the costs of the incumbents' competitors, but also deter efficient investment in competing local transport networks, delaying the development of facilities-based competition.

To prevent such unreasonable, anticompetitive practices, the Commission should prohibit incumbent LECs from imposing "grooming" restrictions that discourage competitive carriers from deploying and expanding local fiber transport facilities. In particular, the Commission should adopt minimum grooming requirements to ensure that competitive carriers can migrate special access circuits quickly and efficiently from incumbent LEC networks to their own networks or to those maintained by other competitive carriers. If a competitive carrier places an order for a grooming project, the incumbent LEC should be required to complete the groom within the interval requested by the competitive carrier, or provide a written explanation of why it cannot accommodate the competitive carrier's request.

Because the grooming process is similar to the new installation process, there should be a presumption that an incumbent LEC has the capability to complete grooms in the same quantities and within the same timeframe as it completes new installations. For example, if an incumbent LEC is able to complete 2,000 new installations per month, the presumption should be that the incumbent LEC can complete the same number of grooms in a month. Similarly, if the incumbent LEC does not place a limit on the number of new installations it will complete in a month, it should not be permitted to place a limit on the number of grooms it will complete in a month.

In addition, the FCC should require all Tier 1 incumbent LECs to advise the FCC of their current procedures (including timing) for processing grooming requests. Further, each Tier 1 incumbent LEC should be required to inform the Commission on a regular basis if any of the grooming requests have been pending for more than 60 days after the requested due date. For any grooming requests pending more than 60 days after the requested due date, the Tier 1 incumbent LEC should be required to provide a specific plan for eliminating the existing backlog promptly. In order to address the disincentives to deploy competitive facilities created by unreasonable delays in acting on grooming requests, incumbent LECs should also be required to provide "transitional billing" for circuits for which the grooming request has been pending for more than 60 days after the requested due date. Under "transitional billing" a competitive LEC would be billed as if the requested groom had been completed. For example, if a requested groom would allow a competitive carrier to replace a 20-mile special access circuit with a 5-mile special access circuit, transitional billing would reflect only a 5-mile charge even if the incumbent LEC had failed to complete the groom on time, forcing the competitive carrier to continue relying on a 20-mile special access circuit.

3) Separation and Non-Discrimination Requirements. The Commission should require incumbent LECs to provide interLATA and intraLATA Frame Relay and ATM services through a separate affiliate, in accordance with the requirements of section 272.¹⁰ A separate

¹⁰ 47 U.S.C. § 272.

affiliate is needed to provide transparency and deter discrimination by incumbent LECs against rival providers of those services. After three years, the FCC can revisit this issue, and consider relaxing the requirement if adequate facilities-based wholesale alternatives have developed to the point that the incumbent LECs no longer wield market power in the provision of local transmission services.

With these three safeguards in place, and the FCC prepared to ensure their enforcement, the Commission would have a sound basis for concluding that the incumbent LECs' ability to raise their rivals' costs in the provision of intraLATA or interLATA Frame Relay and ATM services has been significantly diminished. Further, by ensuring that competitive carriers are able to offer competing intraLATA and interLATA services to enterprise customers, the FCC would minimize the risk that incumbent LECs would be able to restrict unilaterally their retail output of these services.¹¹

Safeguards for Mass Market (DSL) Services

As with services provided to enterprise customers, competitive carriers cannot provide DSL service to mass market customers without access to the last-mile loop facilities connecting end users to the telephone network. As long as these vital facilities remain under the control of the incumbent LECs, the incumbent LECs will have the incentive and the ability to use their market power to raise their rivals' costs of offering DSL service, limiting competitive options for mass market customers.¹² Safeguards analogous to those described above for ATM and Frame Relay services therefore are needed to prevent incumbent LECs from using their control over bottleneck local telecommunications links to disadvantage competing providers of mass market DSL service. To compete effectively in the provision of broadband services to mass market customers, competitive carriers require access to three different types of loops: stand-alone copper loops, hybrid copper-fiber loops and loops over which the incumbent LECs offer voice service.

In the *UNE Triennial Review* proceeding, the Commission required incumbent LECs to provide competing carriers non-discriminatory access to stand-alone copper loops pursuant to section 251.¹³ This unbundling requirement enables competitors to provide DSL service to mass

¹¹ See *Broadband Dominance/Non-Dominance NPRM* ¶¶ 28-29 & nn. 66-67 (explaining that "Stiglerian" market power arises from a carrier's ability to raise prices by restricting its own output, while "Bainian" market power arises from a carrier's ability to raise prices by increasing its rivals' costs or restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services).

¹² As noted below, cable companies have no obligation to provide competitors with unbundled or wholesale access to inputs, leaving competitive LECs completely dependent on the incumbent LECs for the access they need to provide DSL to mass market customers. See WorldCom Comments at 11-12, CC Docket No. 01-337 (March 1, 2002).

¹³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,

market customers that are served over stand-alone copper loops,¹⁴ and operates as one of the critical safeguards that must be in place before the Commission considers reclassifying incumbent LECs as non-dominant in the provision of DSL services.

The FCC must also ensure that competitive carriers have access to hybrid fiber-copper loops and loops over which incumbent LECs are providing voice service. In the *UNE Triennial Review Order*, however, the FCC declined to find that section 251 requires incumbent LECs to provide unbundled access to these types of loops. Thus, there is no section 251 unbundling obligation to constrain an incumbent LEC's ability to use its control over these types of loops to raise the costs of its rival DSL providers.¹⁵ It is important to note that the FCC's decision to refrain from requiring incumbent LECs to unbundle fiber feeder plant pursuant to section 251 was not based on a finding of non-impairment.¹⁶ Rather, the FCC's decision was based primarily on concerns about investment incentives – specifically, “whether refraining from unbundling requirements will stimulate facilities-based investment and promote the deployment of advanced telecommunications infrastructure.”¹⁷ Thus, the FCC's decision not to require unbundling of hybrid fiber-copper loops was not based on a finding that marketplace forces limited the incumbent LECs' ability to exercise market power.

The FCC did require incumbent LECs to provide competitors with access to the high frequency portion of loops over which the incumbent LEC provides voice service during a

18 FCC Rcd 16978 (FCC 03-36) (2003), *as modified by* Errata, 18 FCC Rcd 19020 (FCC 03-227) (2003) (*UNE Triennial Review Order*).

¹⁴ *UNE Triennial Review Order* ¶¶ 236, 248-250 & nn.746-747.

¹⁵ Although the FCC found that cable companies have made “significant inroads in providing broadband service to the mass market,” *UNE Triennial Review Order* ¶ 292, competition from cable companies will not constrain the price of incumbent LEC-provided inputs for DSL. While the incumbent LECs might have an incentive to price their retail DSL service at a rate that is competitive with that of the cable modem service in markets where cable companies have deployed high-speed Internet access service, incumbent LECs would have no incentive to price their wholesale DSL product at a rate that would enable competitive providers to match the cable modem rate. Cable companies have no obligation to provide competitors with unbundled or wholesale access to inputs, so that competitive LECs are completely dependent on inputs provided by incumbent LECs. *See* WorldCom Comments at 11-12, CC Docket No. 01-337 (March 1, 2002). Incumbent LECs thus have both the incentive and the means to price such inputs at rates that effectively preclude competitive LECs from competing in the provision of DSL service.

¹⁶ *UNE Triennial Review Order* ¶ 211.

¹⁷ *UNE Triennial Review Order* ¶ 286; *see also id.* ¶ 290 (explaining that precluding unbundled access to the packetized fiber capabilities of hybrid loops will promote the section 706 goal of “remov[ing] barriers to infrastructure investment.”) (quoting section 706(a) of the Telecommunications Act of 1996).

transition period.¹⁸ Once that transition period ends, however, end users that elect to purchase voice service from an incumbent LEC will be foreclosed from obtaining DSL service from a competitive provider unless the FCC adopts the safeguards proposed below.

Because incumbent LECs are not required to provide access under section 251 to end users served over hybrid copper-fiber loops or loops over which incumbent LECs provide voice services, it is essential that the following safeguards be in place before the FCC considers reclassifying incumbent LECs as non-dominant in the provision of DSL services. Specifically, the FCC should require incumbent LECs to provide a packetized service offering over hybrid copper-fiber loops and a line sharing service.¹⁹ In addition, the FCC should adopt transitional non-discrimination safeguards that would apply to previously-dominant incumbent LECs. Each of these safeguards is described below:

1) Packetized Service Offering Over Hybrid Copper-Fiber Loops. The Commission should require incumbent LECs to offer a packet-switched “bit stream” service over hybrid copper-fiber loops at just and reasonable rates to competing carriers and information service providers. Incumbent LECs must provide this bit-stream access over stand-alone loop facilities, as well as over the same unbundled loop facilities that competitive LECs use to provide voice to their end user customers, including unbundled network element platform (UNE-P) arrangements, in order to permit competitive LECs to provide voice and DSL services to end-user customers over a single line.

2) Line-Sharing Service. The Commission should require incumbent LECs to provide access, at just and reasonable rates, to the high frequency portion of loops that are used by incumbents to offer voice service.

3) Transitional Non-Discrimination Safeguards. In addition, because these safeguards for competitive LECs are untried, the FCC should adopt transitional safeguards designed to deter discrimination, provide transparency, and ensure access to new transmission services and capabilities.²⁰ These safeguards would apply to non-dominant incumbent LECs that were previously dominant.

¹⁸ *UNE Triennial Review Order* ¶¶ 264-269.

¹⁹ As MCI has explained in prior pleadings, the BOCs are already required to provide a packetized service over hybrid loops and a line sharing service as part of their section 271 obligations. *See, e.g.,* Opposition of MCI to Verizon’s Petition for Forbearance at 13-14, CC Docket No. 01-338 (Nov. 17, 2003); Covad and MCI’s Brief in Response to Order Nos. 35 and 5 at 4, 6-9, Texas PUC Docket Nos. 22469 and 26635 (Oct. 24, 2003). The FCC should extend these requirements to all incumbent LECs that seek to be classified as non-dominant in the provision of DSL services.

²⁰ These transitional safeguards were described more fully in a joint *ex parte* letter from EarthLink, MCI, and AOL Time Warner. *See* “Proposal to Streamline Title II Regulation of BOC Advanced Services to Promote Diverse Information Services” (*Joint Proposal*) (proposing

Non-discrimination: A previously-dominant LEC that provides information services would be required to offer all of its high-speed network transmission services and capabilities to all Internet Service Providers (“ISPs”) and competitive LECs at rates, and on terms and conditions, that are just, reasonable, and not unreasonably discriminatory.²¹

Transparency: A previously-dominant incumbent LEC would be required to post on its web site the following information: description of all high-speed network transmission services and capabilities provided under contract; duration of the contract; minimum volume commitments and rates; and all other terms and practices affecting the rates. In addition, each previously-dominant incumbent LEC would be required to provide advance written notice to all purchasing ISPs and competitive LECs of changes in the terms, rates, or conditions. Discontinuance of service would require 120 days’ written notice.²²

Access to new transmission services and capabilities: If an ISP or competitive LEC requests in writing that a previously-dominant incumbent LEC provide access at just and reasonable rates to new network transmission services and capabilities that the LEC does not currently offer, the previously-dominant carrier shall offer the requested access within 90 days. The incumbent LEC would have 15 days to respond in writing to the requesting ISP or competitive LEC and describe either how it will offer the requested access, or the specific basis for the conclusion that the requested access is not technically feasible or economically reasonable.²³

Expedited enforcement: The Commission should also establish an expedited process for resolving any complaints filed by ISPs or competitive LECs against a previously-dominant incumbent LEC alleging a violation of the rules described above (non-discrimination, transparency, or access to new services and capabilities).²⁴

new section 64.702(c) of the FCC’s rules, and explaining the purpose of each proposed subsection), attached to *ex parte* letter from Donna Lampert to Marlene Dortch, CC Docket Nos. 02-33, 95-20, 98-10 (May 1, 2003) (attached hereto as Exhibit A).

²¹ See *Joint Proposal* at 4-5.

²² See *Joint Proposal* at 6-7.

²³ See *Joint Proposal* at 7-9.

²⁴ See *Joint Proposal* at 10-12.

Conclusion

For the foregoing reasons, the FCC should adopt the safeguards outlined above before it considers relaxing regulation of the incumbent LECs' retail Frame Relay, ATM and DSL offerings. Those safeguards are necessary to prevent incumbent LECs from exploiting their power in the local telecommunications market to achieve an anti-competitive advantage in the provision of intraLATA and interLATA Frame Relay, ATM, and DSL services.

Respectfully submitted,

/s/ Richard S. Whitt

Richard S. Whitt

Attachment

Exhibit A

**PROPOSAL TO STREAMLINE TITLE II REGULATION
OF BOC ADVANCED SERVICES
TO PROMOTE DIVERSE INFORMATION SERVICES**

Proposed Title II ISP Access Rule: New Section 64.702(c)

§ 64.702(c): Each Bell Operating Company (including any affiliate)(hereinafter "BOC") shall provide access to its high-speed network to enhanced and information service providers ("ISPs") in the following manner:

(1) Access to Transmission Services and Capabilities

Each BOC shall offer to all ISPs, whether affiliated or unaffiliated, all of its high-speed network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions. Such offerings shall be separate from any other BOC services, including enhanced or information services.

(2) Transparency

(A) With respect to the rates, terms and conditions of the network transmission services and capabilities used by or made available to any ISP, each BOC shall:

- (i) File an interstate tariff with the Commission describing such rates, terms, and conditions; or*
- (ii) Post on its publicly available Internet website, in an accessible and easy to understand format, current and specific information describing such rates, terms and conditions.*

(B) If a BOC enters into an individual contract with an ISP for high-speed network transmission services and capabilities, then the BOC shall tariff or post on its publicly available Internet website, in an accessible and easy to understand format, the following information:

- (i) the term (including renewal option) of the contract;*
- (ii) a description of the high-speed network transmission services and capabilities provided under contract;*
- (iii) minimum volume commitments and price for each of the high-speed network transmission services and capabilities, as well as volume discounts; and*
- (iv) all other classifications, terms or practices affecting the contract rate.*

(C) Each BOC shall provide advance written notice to all purchasing ISPs, including notice by email, of any changes to the rates, terms, and conditions of any of the BOC's high-speed network transmission services and capabilities. In the event the BOC seeks to discontinue any service or capability used by an ISP, such written notice shall be not less than 120 days prior to the proposed discontinuance.

(3) Access to New Transmission Services and Capabilities

- (A) *An ISP may request in writing that a BOC provide access to new network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions.*
- (B) *Where the ISP makes such a reasonable request, the BOC shall offer such access within 90 days, unless the Commission extends such time where the BOC, upon petition, demonstrates good cause.*
- (C) *The BOC shall have 15 days to respond in writing to the requesting ISP, and such response shall describe either:*
 - (i) *how the BOC will offer the requested access within 90 days of the request; or*
 - (ii) *the specific basis for the BOC's position that the requested access is not technically feasible or economically reasonable.*

(4) Definitions *For purposes of this subsection (c):*

"Transmission services and capabilities" shall include, without limitation, the BOC's transmission or telecommunications components or lines, switching and routing components, ordering and operations support systems ("OSS"), signaling, and other network functions or features.

"High-speed network" means a network offering transmission rates of more than 200 Kbps in at least one direction.

Proposed New Rule For Enforcement of ISP Access §1.737

§1.737: ISP Complaints Regarding Rule Section 64.702(c)

(a) *Where a complaint alleges a violation of FCC Rule Section 64.702(c), the following additional procedures shall also apply:*

(1) *In its Answer, the Defendant shall state clearly and precisely all information in its possession, including data compilations (e.g., records of OSS configurations, ordering processes, data on specific orders or maintenance records, etc.), and produce and serve on Complainant and the FCC all such information, including copies of all contracts or arrangements for high-speed network transmission services and capabilities, that may be relevant to the alleged violation of FCC Rule § 64.702(c).*

(2) *If the BOC has not maintained records or other data for the Bureau to resolve fully the alleged violation of FCC Rule § 64.702(c) or if it otherwise fails to produce such data in its Answer, then there shall be a rebuttable presumption in the case that the Complainant has established the alleged violation of FCC Rule § 64.702(c). Complainant may request by motion filed within 10 days after the BOC's Answer an order that such a rebuttable presumption exists in the case; the Bureau shall issue an order granting or denying such motion within 10 days after the time for filing of the BOC's opposition to the complainant's motion.*

(b) After the 15-day response period has elapsed under FCC Rule §64.702(c)(3), the ISP may file a complaint with the FCC concerning the BOC's compliance with its "new service" obligations.

(c) Except if a complaint alleging a violation of FCC Rule § 64.702(c) is accepted for handling on the Accelerated Docket, the Commission shall issue a written order resolving any complaint alleging a violation of FCC Rule § 64.702(c) within 180 calendar days from when such complaint is accepted for filing.

EXPLANATION

This rule is proposed to streamline regulation of the former Bell Operating Companies' ("BOCs'") wireline broadband services under Title II of the Communications Act consistent with the public interest. The proposed rule presents a significant streamlining of the various and sometimes overlapping Title II *Computer Inquiry* obligations for broadband (advanced and/or high-speed) services that currently apply to the BOCs, including all affiliated BOC providers of telecommunications. The proposal supplants the current *Computer Inquiry* obligations for BOC wireline broadband services, set forth in myriad FCC orders and precedent, with a set of Title II rules that are deregulatory, simple, flexible and enforceable and that establish clear access for information service providers ("ISPs") to BOC advanced services and networks to enable ISPs to provide a diversity of competitive information services to the public. Further, to assure enforcement of these streamlined access obligations, the proposal includes new procedures, in a new FCC Rule Section 1.737, described below, for handling ISP formal complaints against BOCs. Under the proposed streamlined Title II rules, ISP access to the wireline broadband transmission components of the BOC networks would provide the essential framework for a vibrant information services market that will, in turn, lead to a number of proven consumer benefits, including robust price and service competition among BOC-affiliated and unaffiliated ISPs, creating innovation, diversity and demand for broadband services.

Under this approach, the Commission could eliminate for wireline broadband services current FCC rule sections 64.702(c) and (d) and the particular requirements set forth in the *Computer Inquiry* precedent, and adopt instead a simplified FCC rule section 64.702 (c)(1)-(4), setting forth BOC Title II obligations in a simple, comprehensible and streamlined manner. More specifically, the proposed rules would eliminate for wireline broadband services a variety of specific *Computer III* and *Computer II* obligations, stated in various FCC orders, including certain: Comparably Efficient Interconnection (“CEI”) obligations, such as the nine CEI parameters; Open Network Architecture (“ONA”) unbundling obligations; CEI procedural obligations, such as CEI plan maintenance, reporting, and web-posting; ONA plan maintenance and prior FCC approval for ONA plan changes; reporting/filing obligations such as the Annual ONA Report, Semi-Annual ONA Report, Quarterly Nondiscrimination Report, and Annual Officer Affidavit; obligations to tariff the *Computer III* basic service elements (“BSEs”) and basic service access arrangements (“BSAs”); and the current rule section 64.702(c) regarding a *Computer II* separate subsidiary.

I. NEW SECTION 64.702 (C)

Proposed Title II ISP Access Rule: New Section 64.702(c) (1)

§ 64.702(c): Each Bell Operating Company (including any affiliate)(hereinafter “BOC”) shall provide access to its high-speed network to enhanced and information service providers (“ISPs”) in the following manner:

(1) Access to Transmission Services and Capabilities Each BOC shall offer to all ISPs, whether affiliated or unaffiliated, all of its high-speed network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions. Such offerings shall be separate from any other BOC services, including enhanced or information services.

Explanation of § 64.702(c)(1):

The proposed Title II rule is intended to take a broad and “bright-line” approach for all ISPs to have access to the same functionalities of the BOC wireline broadband networks,

including installation and maintenance of such functionality, whether used by unaffiliated or affiliated ISPs. The relevant definitions in new § 64.702(c)(4) make clear that associated functions for ordering, repairing and/or signaling continue to be a key component for competition among ISPs and for rapid deployment to the public, and thus the proposed rule ensures openness of the BOC network, as well as associated functions, systems and databases.

Building on the core Title II obligations of Sections 201(b) and 202(a) of the Communications Act barring discriminatory and unreasonable practices, this rule would ensure that the BOCs provide ISPs with access that is not only reasonable, but that is also equal and nondiscriminatory with the treatment and access the BOC provides to its own ISP operations and to other ISPs for broadband services. Thus, for example, if a BOC-affiliated or preferred ISP has access to electronic OSS, databases, or other systems, then the BOC must ensure that competing ISPs have substantially equivalent access. Further, consistent with nondiscrimination, if BOCs collocate information service equipment of affiliated or preferred ISPs, the BOCs would impute reasonable transport costs in a manner similar to minimization of transport precedent. In general, the FCC's Title II precedent, including information services precedent, would inform the Commission's interpretation and enforcement of the new rule. In this way, all ISPs will have maximum opportunity to compete and maximum incentive to create high quality, low price and valuable services for consumers.

As the BOCs introduce new broadband services, they must also reasonably offer access to competing ISPs and continue to offer services relied upon by ISPs and their customers. ISPs, for example, have deployed substantial high-speed information services to the public relying upon a dedicated and reliable connection for the customer, and it would be unreasonable, and a rule violation, for the BOC to discontinue or degrade such services.

Proposed Transparency Requirement: New Section 64.702 (c) (2)

(2) Transparency

(A) *With respect to the rates, terms and conditions of the network transmission services and capabilities used by or made available to any ISP, each BOC shall:*

- (i) *File an interstate tariff with the Commission describing such rates, terms, and conditions; or*
- (ii) *Post on its publicly available Internet website, in an accessible and easy to understand format, current and specific information describing such rates, terms and conditions.*

(B) *If a BOC enters into an individual contract with an ISP for high-speed network transmission services and capabilities, then the BOC shall tariff or post on its publicly available Internet website, in an accessible and easy to understand format, the following information:*

- (i) *the term (including renewal option) of the contract;*
- (ii) *a description of the high-speed network transmission services and capabilities provided under contract;*
- (iii) *minimum volume commitments and price for each of the high-speed network transmission services and capabilities, as well as volume discounts; and*
- (iv) *all other classifications, terms or practices affecting the contract rate.*

(C) *Each BOC shall provide advance written notice to all purchasing ISPs, including notice by email, of any changes to the rates, terms, and conditions of any of the BOC's high-speed network transmission services and capabilities. In the event the BOC seeks to discontinue any service or capability used by an ISP, such written notice shall be not less than 120 days prior to the proposed discontinuance.*

Explanation of § 64.702(c)(2):

This subsection of the proposed rule would streamline for wireline broadband services the *Computer II* and *Computer III* requirements that BOCs tariff (with the Commission and/or state regulatory agencies) the elements of the broadband services and instead proposes an alternative approach to transparency. At the same time, BOCs would still be required to provide service to ISPs, including affiliated ISPs, on rates, terms and conditions that are transparent and publicly available for all ISP customers and competitors. This rule does not restrict the BOC's ability to

establish broadband rates or terms that are novel or tailored to the needs of specific classes of ISP customers, such as low-volume or high-volume arrangements.

Under the proposal, the BOC may choose whether to use existing FCC tariffing processes for BOC wireline broadband services or to web post rates, terms, and conditions, similar to the way that FCC rules require nondominant interexchange carriers to webpost their rates, terms and conditions. *See* 47 C.F.R. § 42.10. The rule also makes clear in subsection 64.702(c)(2)(B) that in the event the BOC enters into an individual case basis contract with any ISP for high-speed network transmission services and capabilities, it must continue to make public the basic parameters of such contract, consistent with requirements governing contract tariffs today. *See* 47 C.F.R. § 61.55(c). The requirement of prior notice in subsection 64.702(c)(2) to existing ISP customers will ensure that ISPs are provided advance information should the BOC intend to make changes to the services upon which the ISPs and their customers rely. In addition, given that ISPs have deployed significant high-speed information services to the public relying upon BOC services and capabilities, this rule would require 120 days notice for discontinuance, to allow the ISP to transition reasonably to a new service or to request continuation of the service pursuant to subsection 64.702(c)(3).

By its operation, the rule would require the BOC to meet all of its safeguard obligations; in the case of a rule violation, the Commission would have authority to order any equitable or compensatory relief, as it deems appropriate to remedy the matter.

Proposed New Capabilities Requirement: New Section 64.702(c) (3)

(3) Access to New Transmission Services and Capabilities

(A) An ISP may request in writing that a BOC provide access to new network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions.

- (B) Where the ISP makes such a reasonable request, the BOC shall offer such access within 90 days, unless the Commission extends such time where the BOC, upon petition, demonstrates good cause.*
- (C) The BOC shall have 15 days to respond in writing to the requesting ISP, and such response shall describe either:*
- (i) how the BOC will offer the requested access within 90 days of the request; or*
 - (ii) the specific basis for the BOC's position that the requested access is not technically feasible or economically reasonable.*

Explanation of § 64.702(c)(3):

To promote full and robust wireline broadband information services competition, with its proven and clear consumer welfare benefits, the proposed rule ensures that as new services, capabilities and functionalities emerge, consistent with the evolution of technology and network design, ISPs have continuing access so that they can provide innovative broadband information services to their customers. The rule would also enable ISPs to continue using services that the BOCs may seek to discontinue for their own ISPs by requesting such access as a “new” service. Once the BOC provides a service pursuant to this subsection, that service would be offered pursuant to the terms of subsections 64.702(c)(1) and (2), requiring just, reasonable and nondiscriminatory rates, terms and conditions and transparency, to allow all ISPs to avail themselves of the offering

The proposed rule would eliminate for wireline broadband services the sometimes complex and cumbersome ONA process, which includes ONA plans, ONA plan amendments, the Annual and Semi-Annual ONA Report, and similar specific requirements that are related to these obligations. The proposed rule would also eliminate for wireline broadband services ONA reporting and other ONA safeguards and, instead, require a simple process for service requests, with marketplace negotiations and enforceable ISP rights of access.

The ability of unaffiliated ISPs to introduce new information services depends on their ability to obtain access arrangements that are otherwise not in use specifically by the BOC ISP. While this was a central tenet of the ONA process, the proposed rule greatly simplifies for wireline broadband services the former process and regulatory framework. *Third Computer Inquiry, Report and Order*, 104 F.C.C. 2d 958, 1064-66 (1986). Thus, ONA plans, amendments, reporting and record keeping are not the focus of the new approach. If an ISP makes a legitimate request for a new wireline broadband service or capability, however, then it is vitally important for the BOC to offer such access in an expeditious manner, since otherwise new broadband information services will not reach the market and, equally important, the BOC ISP could strategically limit or delay its use of services or capabilities to prevent competitive new broadband services from reaching consumers. Under this rule, the BOC would be required to respond to ISP requests for new wireline broadband service transmission services and capabilities with reasonable rates and terms of service. The right to request and, if necessary, follow up with an enforcement action would establish a minimum of regulation and an enforceable right for the introduction of creative new information services to the American public.

Proposed Definitions: New Section 64.702(c) (4)

(4) *Definitions For purposes of this subsection (c):*

"Transmission services and capabilities" shall include, without limitation, the BOC's transmission or telecommunications components or lines, switching and routing components, ordering and operations support systems ("OSS"), signaling, and other network functions or features.

"High-speed network" means a network offering transmission rates of more than 200 Kbps in at least one direction.

Explanation of § 64.702(c)(4):

The definitions of the proposed rule are designed to encompass for wireline broadband offerings the type of functionalities, services and capabilities referenced throughout the

Computer Inquiry proceedings, including functionality necessary for ISPs to provide broadband-based services to consumers such as OSS and similar capabilities. The definitions are premised on the principle that access is only viable if it can be used efficiently. The definition of “high-speed network” tracks the definition previously adopted by the FCC. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities, Third Report*, 17 FCC Rcd. 2844, ¶ 7 (2002) (As it has done in prior reports on advanced services, FCC adopts “the term ‘high-speed’ to describe services with over 200 kpbs capability in at least one direction”).

II. NEW SECTION 1.737 – ENFORCEMENT

Proposed New Rule For Enforcement of ISP Access Rule – § 1.737

§1.737: ISP Complaints Regarding Rule Section 64.702(c)

(a) Where a complaint alleges a violation of FCC Rule Section 64.702(c), the following additional procedures shall also apply:

(1) In its Answer, the Defendant shall state clearly and precisely all information in its possession, including data compilations (including records of OSS configurations, order processes, data on specific orders or maintenance records, high-speed network transmission services and capabilities deployment, etc.), and produce and serve on Complainant and the FCC all such information, including copies of all contracts or arrangements for high-speed network transmission services and capabilities, that may be relevant to the alleged violation of FCC Rule § 64.702(c).

(2) If the BOC has not maintained records or other data for the Bureau to resolve fully the alleged violation of FCC Rule § 64.702(c) or if it otherwise fails to produce such data in its Answer, then there shall be a rebuttable presumption in the case that the Complainant has established the alleged violation of FCC Rule § 64.702(c). Complainant may request by motion filed within 10 days after the BOC’s Answer an order that such a rebuttable presumption exists in the case; the Bureau shall issue an order granting or denying such motion within 10 days after the time for filing of the BOC’s opposition to the complainant’s motion.

(b) After the 15-day response period has elapsed under FCC Rule §64.702(c)(3), the ISP may file a complaint with the FCC concerning the BOC’s compliance with its “new service” obligations.

(c) Except if a complaint alleging a violation of FCC Rule § 64.702(c) is accepted for handling on the Accelerated Docket, the Commission shall issue a written order resolving any complaint alleging a violation of FCC Rule § 64.702(c) within 180 calendar days from when such complaint is accepted for filing.

Explanation of § 1.737:

The proposed rule would facilitate significant streamlining of the various Title II *Computer II* and *Computer III* obligations, as explained above, by providing ISPs with effective enforcement in complaint actions when significant BOC misconduct has occurred. As a Title II-based rule, Section 208 and existing FCC and judicial precedent would remain relevant to determine what is just, reasonable and/or nondiscriminatory under the Communications Act.

The proposed rule reflects the fact that due to ISP reliance upon the BOCs, the BOC controls much of the information relevant to a fair and accurate determination of whether a rule violation has occurred. It is the BOC that controls the OSS systems, maintenance records, configurations of systems, and access to the transmission components and capabilities, as well as the ability to modify those things for its benefit. Typically, the ISP does not have access to this information, especially in cases where discriminatory practices are alleged. To address this disparity, various *Computer Inquiry* obligations imposed several reporting and certification obligations to ensure nondiscrimination and transparency by the BOC. The proposed deregulatory approach, however, eliminates for wireline broadband services BOC reporting and similar obligations. Instead, to ensure the effective administration of justice, the protection of the public interest, and to avoid the potential for pre-litigation evidence destruction, the BOC is held responsible for producing all necessary information to resolve any complaints that may arise. If the BOC cannot do so or has chosen record maintenance or retention systems that are inadequate for the Commission to resolve the dispute, then the burden is placed properly on the BOC to demonstrate that no rule violation has occurred. This limited shift of burden is consistent with FCC and judicial precedent in cases where the defendant has failed to produce evidence within its exclusive access or control that is necessary for adjudication of the dispute. FCC rules and

precedent are wholly consistent with this approach. Cf. 47 C.F.R. § 64.1150(d). See also, *In the Matter of WorldCom, Inc.*, Order, DA 02-2569 (rel. Oct. 8, 2002); *In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd. 22497, ¶ 278 (1997); *In re Complaint of L. Douglas Wilder and Marshall Coleman Against Station WRIC-TV Petersburg, Virginia*, Further Discovery Order, 12 FCC Rcd. 4111, ¶27 (1997). Indeed, Part 42 of the Commission's rules requiring carriers to retain certain records, 47 C.F.R. § 42.1 *et seq.*, "was established to ensure the availability of carrier records needed by this Commission to meet its regulatory obligations." *In the Matter of Revision of Part 42*, Report and Order, 60 R.R. 2d (P&F) 1529, ¶ 2 (1986).

In addition, because experience has shown that enforcement delay can effectively become a denial of access in the rapidly moving broadband information services arena, the rule would require resolution of complaints within 180 days. For the same reasons, it is assumed that the Enforcement Bureau would make more frequent use of the accelerated docket process to resolve cases of enforcement of the ISP access rule.